IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

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| NORTHERN PACIFIC RAILWAY COMPANY, *Appellant,* | No. 598 |
| vs. | |
| J. A. SODERBERG, *Appellee.* | |

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## MOTION TO DISMISS APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Comes now J. A. Soderberg, appellee herein, by J. T. Ronald, his solicitor, and moves this Honorable Court that this appeal be dismissed, and bases this

motion upon and alleges the following grounds, to-wit:

I.

This cause was instituted by the appellant as complainant, against the appellee as defendant, originally in, and tried by, the Circuit Court of the United States for the District of Washington, Northern Division.

II.

That the jurisdiction of said Circuit Court for said District of Washington, Northern Division, was invoked, as appears from the subpoena and bill of complaint, upon the ground of divers citizenship; and it does not appear affirmatively from said subpoena or said bill of complaint that any other ground of jurisdiction was invoked; that divers citizenship was the sole ground upon which jurisdiction was rested.

III.

That on the 8th day of March, A. D. 1900, a decree was therein entered in favor of the appellee therein, confirming his title to the premises in dispute, and dismissing the bill of complaint of the said complainant, from which decree so rendered, complainant, as appellant, appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which said United States Circuit Court of Appeals there-

after, on October 1st, 1900, duly entered its judgment and decree, confirming the decree of the said Circuit Court of the United States for the District of Washington, Northern Division.

Wherefore, by reason of the facts aforesaid, said decree of said United States Circuit Court of Appeals for the Ninth Circuit was a final judgment, and no appeal lies therefrom, and the attempted appeal herein does not give this court jurisdiction.

J. T. RONALD,
Solicitor for Appellee.

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NORTHERN PACIFIC RAILWAY COMPANY, *Appellant,*

vs.

J. A. SODERBERG, *Appellee.*

No. 598.

## ARGUMENT OF APPELLEE ON MOTION TO DISMISS APPEAL.

Appellee moves to dismiss, for the reason that the only ground on which the jurisdiction of the Circuit Court of the United States for the District of Washington, Northern Division, was invoked, being divers citizenship, the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, from which this appeal is attempted, was final.

If this reason is well founded in fact, this appeal must be dimissed under previous decisions of this court. Let us examine the subpoena and bill of complaint.

The *Subpoena Ad Respondendum* (see record p. 4) in so far as it is material here, commands Soderberg to "be and appear in said Circuit Court of the United States aforesaid, at the court room in Seattle, on the 5th day of December, A. D. 1898, and answer the bill of complaint for judgment against you in said court by the Northern Pacific Railway Company, who is a citizen of the State of Wisconsin, and to do and receive what said court shall have considered in that behalf, and this you are not to omit under the penalty of Five Thousand Dollars.

"Witness, etc., etc."

The amended bill of complaint (see record p. 5) commences as follows:

"The Northern Pacific Railway Company, a corporation, organized, created, and existing under and by virtue of the laws of the State of Wisconsin, by leave of court first had and obtained, files this, its amended bill of complaint, against J. A. Soderberg, a citizen and resident of the State of Washington, and thereupon your orator complains and says:"

Paragraph one alleges the incorporation of the Northern Pacific Rail*road* Company by an act of Congress approved July 2, 1864, with certain powers and authorities therein.

Paragraph two quotes certain sections of that Act granting lands to the Railroad Company.

Paragraph three alleges the acceptance by the Railroad Company of the terms and conditions imposed by Congress.

Paragraph four sets out the joint resolution of May 31, 1870, by which an alteration was made in the Act, and authorizing the company to build its main road via the valley of the Columbia river, with its branch from some convenient point on its main trunk line across the Cascade mountains to Puget Sound.

Paragraph five alleges that thereafter the Northern Pacific Railroad Company proceeded with the work of surveying and locating the line of its branch road from Pasco to Tacoma, Washington, and prior to March 26, 1884, had surveyed and definitely located said Cascade branch, extending coterminous with and within forty miles of the northeast quarter of section nineteen (19), township twenty-seven (27) north, range ten (10) east, of the Willamette meridian, and on said 26th day of March, 1884, filed its plat of definite location in the General Land Office. That at said date said land above described was public land, to which the United States had full title, and had not reserved, sold or otherwise appropriated, and was non-mineral in character.

Complainant further alleges in paragraph five, that it complied with all the conditions, so that on April 23, 1884, the president accepted the railroad coterminous with said land and directed that patents be issued, conveying same to the Northern Pacific Railroad Company, but that no patent has yet issued, and that by virtue of the matters and things therein

alleged, said Northern Pacific Railroad Company became, and until the 31st day of August, 1896, was the owner of said land, and was entitled to the exclusive possession of the same.

Paragraph six alleges "that your orator, Northern Pacific Railway (by mistake printed Railroad) Company, is a corporation organized, created and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of the State of Wisconsin, and was not organized, nor is it a corporation under the laws of the State of Washington."

Paragraph seven alleges that on or about the 31st day of August, 1896, the Rail*way* Company, by virtue of certain deeds of conveyance executed by the Rail*road* Company, became the owner of all the rights of said Railroad Company.

Paragraph eight alleges that the Railway Company, ever since that date has been and is operating said railroad, carrying mails, etc.

Paragraph nine alleges that the matter in dispute is of the value of $5,000, and that the defendant, on the .... day of ....., 1898, entered upon the land, and without any right, authority or permission, and against the will of the complainant, commenced to excavate, blast, quarry and remove the granite from the land and to sell and dispose of the same, and has continued daily since that date to do the same, and

threatens to continue so to do; that he has already quarried and shipped over 8,000 lineal feet of granite of the value of $1.10 per foot, and that he is insolvent and financially irresponsible and unable to respond for the injury done, and his acts work irreparable injury to the complainant, who asks for an injunction.

Omitting for the present paragraph ten, we note that the complainant in paragraph eleven alleges: "That the defendant was, at the time of the filing of the original bill, and for a long time prior thereto had been, and ever since said date has been, a resident and citizen of the State of Washington."

Briefly summarized, the ten paragraphs above referred to, merely allege that the Northern Pacific Rail*road* Company was granted certain lands; that the Northern Pacific Rail*way* Company is the successor of the Northern Pacific Railroad Company; that the defendant wrongfully entered upon the lands without right or authority, and has been and still is quarrying and removing granite therefrom; that the complainant (paragraph 6) is a citizen of the State of Wisconsin, and the defendant (paragraph 11) is a citizen of the State of Washington, and the matter in dispute (paragraph 9) is of the value of Five Thousand Dollars.

Now, we submit that there is not a single allegation in the complaint thus far analyzed, upon which it

is possible to rest the jurisdiction of the Circuit Court, excepting divers citizenship solely. If there is any other ground mentioned in this complaint upon which jurisdiction can be rested, it must be in the allegations of paragraph ten, which let us now examine:

These allegations show "that defendant as complainant is informed and believes, has filed what purports to be a mineral location upon the premises, and claims them as such for the granite thereon, which granite may be used for building purposes, by reason of which defendant asserts that said premises are excepted from the grant to the Railroad Company under act of June 2, 1864."

But we think that if it was intended by the above allegation to raise any federal question, the complainant has either pleaded too much or too little. The single allegation above set forth is insufficient, in our judgment, to give the court jurisdiction. Again, if that allegation standing alone is sufficient, then we submit that the complainant has pleaded too much, for to said last allegation complainant adds the words (being the last words in paragraph ten) "And the question of whether said premises are mineral or non-mineral has not yet been determined by the Land Department of the United States."

This court has repeatedly held that courts will not determine, in advance of the Land Department, the character of the land; so that we think it shows

on the face of paragraph ten, that the question attempted to be raised is one which this court will not pass upon until after the Land Department shall have first decided the matter.

Now, to further illustrate the point, suppose we eliminate from the bill of complaint all allegations of divers citizenship, or, suppose both parties to be citizens of the State of Washington, and the only ground for the invocation of the jurisdiction of the Circuit Court to be the allegations in said paragraph ten. Does enough appear therefrom to confer jurisdiction upon the Circuit Court? If not, then jurisdiction is not rested upon the allegations of paragraph ten, but must therefore rest solely upon divers citizenship.

"When the original jurisdiction of the Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset from the declaration of the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance."

*Col. Cent. Con. Min. Co. v. Turck,* 150 U. S. 143.

Now, we think, that if there were no question of divers citizenship here, and jurisdiction of the Circuit Court was invoked upon the sole allegations in paragraph ten, the court would refuse to entertain the

case, especially, if for no other reason, in advance of the Land Department.

"In order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different states."

*Borgemeyer vs. Idler,* 159 U. S. 412.

Under the doctrine announced in the case last cited, it appears from the subpoena and bill of complaint herein "that the suit was one of which cognizance could be properly taken on the ground of divers citizenship, and it did not appear therefrom that jurisdiction rested or could be asserted on any other ground."

See, also, *Press Publishing Co. vs. Monroe,* 164 U. S. 105.

Wherefore, appellee respectfully submits that the appeal herein should be dismissed.

J. T. RONALD,
Solicitor for Appellee.